IN THE

Supreme Court of the United States.

October Term, 1921.

THE UNITED STATES, Appellant,
v.
MASON & HANGER COMPANY. } No. 410.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE IN OPPOSITION TO APPELANT'S MOTION TO REQUIRE ADDITIONAL FINDINGS OF FACT

AND

APPELLANT'S MOTION FOR A WRIT OF *CERTIORARI*.

STATEMENT OF THE CASE.

The judgment by the Court of Claims in favor of claimant from which this appeal is taken arises (rec. pp. 1, 5) from a suit upon a cost plus contract for cantonment construction during the war. Claimant was allowed the cost of certain policies of liability, accident and burglary insurance (petition, p. 1; Finding V, p. 19; opinion, p. 20; judgment, p. 21).

The contract provides, so far as material here, for payment of costs as follows (Article II):

"(*h*) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require."

The term "contracting officer" is defined as follows:

"It is understood and agreed that wherever the words 'contracting officer' are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War and any duly appointed representative of the contracting officer."

The court has found the following facts material to the present motion:

(*a*) Major W. A. Dempsey was contracting officer named in the contract at the time of its execution, June 20, 1917 (Finding II, p. 18).

(*b*) On July 16, 1917, Colonel I. W. Littell, the officer in charge of cantonment construction in the War Department (middle p. 18, in Finding III) was substituted by the Secretary of War as contracting officer (Finding II, p. 18).

(*c*) Claimant, acting under instructions of the constructing quartermaster, the representative on the work of the contracting officer, took out the liability insurance in question and paid the premiums (Finding V, p. 19).

(*d*) Major Dempsey, on July 17, 1917, the day after he had ceased to be contracting officer, refused to approve the payment of these premiums (Finding V, p. 19).

(*e*) On December 22, 1917, Colonel Littell, then contracting officer, approved the taking out of these policies and directed payment of the premiums by the United States to claimant (Finding V, p. 19).

The court rendered judgment for the amount of the premiums for the following reason (opinion, rec. p. 20):

"These premiums were paid by the plaintiff, and such payment was approved by the contracting officer, and having been so approved under Article II of the contract the payment must be allowed."

The present motion seeks to require the Court of Claims to find whether on June 28, 1917, the contracting officer issued instructions to the contractor that it was to obtain fire insurance and workmen's compensation insurance and that other insurance risks would be assumed by the government. The petition for writ of *certiorari* asks to have added to the record the defendant's motion filed June 11, 1921, in the court below, for such a finding.

The theory apparently is that the notice on June 28, 1917, that risks other than of fire and accidents to workmen would be assumed by the United States was a final disapproval of all liability or burglary policies and rendered void the approval by the contracting officer on December 22, 1917.

The court below made no such finding as is now requested on behalf of the United States. This may have been (*a*) because the court did not consider that the facts asserted were true; or (*b*) because the court did not consider them to be established by competent evidence; or (*c*) because the court considered them so clearly immaterial as not proper to be included in the findings.

Objections to the Motion.

The following objections are made to this motion:

1. The finding asked is obviously immaterial. The court has found (Finding V, p. 19) that the expenditures were approved by the contracting officer. The contractor had in any case the right to take out the insur-

ance. The only question was whether the contracting officer would approve it as a liability of the United States under the contract. The instructions in question were not a disapproval. They were a declaration of policy. Upon further experience and the full presentation of a concrete case, the contracting officer or his successor at the proper time might see the error of the policy and approve the expenditure. This actually happened. It is very analogous to *United States* v. *Barlow*, 184 U. S. 123, 133, where the court said that the power of appointment of an engineer in charge "would be a useless right if, when appointed, he could anticipate and control the judgment of his successor."

2. By Article XIV, p. 14, it is provided:

"If the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provision of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination."

It appears by Finding III, p. 18, that Colonel Littell, who was on July 16 designated as contracting officer, was also "in charge of cantonment construction." Even if Major Dempsey had previously given his final disapproval to this expenditure, it was within Colonel Littell's authority to reverse Major Dempsey's decision as the officer in charge of cantonment construction, even if he could not do so as contracting officer.

3. The whole subject is already covered by Finding V, p. 19. It there appears (*a*) that "acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out" the insurance policies here in question and paid premiums thereon; (*b*) that

Major Dempsey the day after he ceased to be contracting officer refused to approve payment of premiums on these policies; (*c*) that some months later Colonel Littell, contracting officer as well as the officer in charge of cantonment construction, approved them. It is now sought to show that Major Dempsey directed insurance to be obtained against certain risks, adding "Other insurance risks assumed by Government." The finding already covers the entire ground.

4. In one of the cases cited in the motion, *United States* v. *Adams*, 6 Wall. 101, 111, this court condemned a finding of letters and affidavits "because it was the object of the rule to impose upon the Court of Claims the duty of drawing the inferences and conclusions which such documents are supposed to establish, or to decide that they do not establish them."

5. It does not appear here that competent evidence proving that the contracting officer gave such instructions on June 28, 1917, was before the Court of Claims. Perusal of that record at the place referred to (p. 2 of motion) shows that the Comptroller of the Treasury in his adverse decision on the claim quoted the words appearing on p. 2 of the motion, preceded by the words, "Instructions were sent to the contractor on June 28, 1917, as follows:" The source of the instructions does not appear. Defendants' original request for findings of fact (motion, p. 2) asked only a finding that "instructions were sent." It was not until after the judgment (motion, p. 5) that a finding was asked that the contracting officer sent out instructions. The paper itself is not produced. Only an extract is quoted. The Court of Claims was justified on this state of the record alone, if for no other reason, in refusing to find that the contracting officer issued such instructions.

5. The present rule of this court prescribing findings

of the Court of Claims, promulgated January 29, 1879, 97 U. S. p. viii, is as follows:

"*Rule V.* In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact."

It took the place of an earlier rule, printed in *Mahan* v. *United States*, 14 Wall. 110, as follows:

"In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court."

It thus appears that prior to 1879 the Court of Claims was required in every case to do what appellant claims should be done here, but that the practice was found inexpedient and was therefore abandoned. What was a matter of right under the old rule is a matter of discretion now. We submit that we have shown reasons why the discretion should not be exercised.

Cases illustrating the more recent practice of the court are *United States* v. *New York Indians*, 173 U. S. 464, 470; *United States* v. *Anciens Etablissements*, 224 U. S. 309, 329; *United States* v. *Purcell Envelope Co.* 249 U. S. 313, 323. In the last case, the government's motion for additional findings was denied, but the right reserved to make an order for additional findings, if deemed necessary. It was found unnecessary when the case was argued on its merits.

The foregoing discussion sufficiently answers the petition for *certiorari*, with the exception of a single suggestion. It is not disputed that defendants' motion to amend findings was filed on June 11, 1921, as alleged. It will not assist this court to a settlement of the questions of law arising on the appeal to have that motion certified as a part of the record.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES, APPELLANT,
v.
MASON & HANGER CO. } No. 121.

THE UNITED STATES, APPELLANT,
v.
NORTHEASTERN CONSTRUCTION CO. } No. 122.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES ON REHEARING.

The statement of these cases appears in the original brief of the Government and in its petition for rehearing, both of which are respectfully referred to.

On the original hearing in these cases in this court it was contended by the Government that the premium paid on the bond provided for in Article IX of the contract was not an expenditure in the performance of the work within the meaning of Article II of the contract obligating the Government to pay for the same. Appellees contended contrariwise. But this court in its opinion said:

> We are, however, not called upon to pass upon the conflicting contentions. The con-

tract contains other provisions that determine the liability of the Government.

The United States still contends as it did in its original brief and in its petition for a rehearing that within the meaning of Article II the premium paid on the said bond was not an expenditure in the performance of the work, and the Government does not waive that contention now, but insists upon it; nevertheless had the court determined that the premium was an expenditure within the meaning of Article II no petition for a rehearing would have been presented, when however, the court decided that Articles IV and XIV of the contract left the decision of the question as to whether the Government was liable for the premium so paid to the contracting officer to decide and that his decision so made and payment made thereon was final and binding upon both parties, the Government deemed it wise that the court's attention should be again called to this matter and that it further reflect thereon before definitely announcing that such were the legal effect of the provisions of the contract referred to.

The contract, therefore, becomes the important question for consideration.

It is an established principle of law on the subject of construction of contracts that a contract is to be interpreted as a whole and the true meaning of any provision in it arrived at from a consideration of all its provisions.

> The meaning of the parties must be ascertained by the tenor of the writing, and not by

looking at a part of it. *Boardman* v. *Reed*, 6 Peters, 327–344–345.

The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *O'Brien* v. *Miller*, 168 U. S. 287–297.

In giving a proper construction the court is required to examine the entire contract, to consider the relation of the parties and the circumstances under which it was signed. *United States* v. *Stage Co.*, 199 U. S. 414–423.

The intention of the parties must be deduced from the entire agreement and from all its provisions considered together, because where a contract has many stipulations, it is plain that the parties understood and agreed that their intention was not expressed by any single part or provision of their agreement, but by every part and stipulation, so construed as to be consistent with every other part and with the entire contract. Judge Sandburn, in *Press Steel Co.* v. *Eastern Ry. Co.* (C. C. A.) 121 Fed. 609–611.

This general rule is made specifically applicable to this contract by its own provisions; Article XIV contains the following:

> This contract shall be interpreted as a whole and the intent of the whole instrument rather than the interpretation of any special clause, shall govern.

Having regard to this rule of construction it seems clear that this contract establishes a fiduciary relation between the Government and the contractor.

Article VI, paragraph (h) provides that the contractor shall

> At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the Contracting Officer and the United States.

In the preliminary recitations of the contract there is this provision:

> Whereas, the Contractor has had experience in the execution of similar work, has an organization suitable for the performance of such work, and is ready to undertake the same upon the terms and conditions herein provided.

This was a representation by the contractor to the Government that the contractor was possessed of an organization which was suitable to the proper supervision of the construction work undertaken, and which would enable it to make effective its agreement "to protect and subserve the interest of the contracting officer and the United States."

The Government was undertaking to reimburse the contractor for the expenditure of millions of dollars of the public funds, and at a time when the Government had need in a special sense of every dollar of the public funds it could obtain. There was in that critical situation a special reason for requiring the contractor "to protect and subserve the interest of the contracting officer and the United States." And by the provisions above referred to, it is plain

the contractor undertook to perform this work while sustaining the fiduciary relation to the Government. It represented that it possessed an organization suitable for the proper supervision of the performance of the contract so that the Government should not be required to reimburse the contractor for any greater sum than under all the circumstances existing at the time was reasonably necessary.

The Government did not undertake in this contract to furnish an adequate personnel to supervise the construction work in its details. Indeed, the contract mentions only one Government representative, to wit, the contracting officer. Doubtless, there were other Government officials present during the construction work; but by the contract the Government did not undertake to supervise the details of the construction—that was entrusted by the contract to the suitable organization of the contractor; and in the performance of the work it is clear from all the provisions in this contract that the Government reposed in the contractor a special trust to so supervise the construction as to protect the Government's interests. That trust obligation the contractor could not avoid. It required of him the most careful supervision in the use of both materials and labor. The Government did not undertake to reimburse the contractor for all of his expenditures. The language of the contract in Article II is:

> The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures. * * *

It may be claimed, however, that by the terms of the contract the settlements made between the contracting officer and the contractor, monthly, were final and binding upon both parties and that the Government is bound and concluded thereby and can not go back of such settlements. Article VIII of the contract provides for the termination of the contract before completion, and provides for final settlement with the contractor in such event. This Article concludes with the following provision:

> * * * When the Contracting Officer shall have performed the duties incumbent upon him under the provisions of this Article, the Contracting Officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions or claims of any kind on the part of the Contractor hereunder or on account hereof.

This provision by its plain terms relates only to settlement with the contractor in case of termination before completion of the contract, which is not involved here. This settlement in case of termination before completion was a final settlement and each party released the other "from any and all demands, actions or claims of any kind." This is the only provision in the contract for release of actions and claims. There is no such provision which is to take effect upon termination of the contract by performance.

Article IV provides for a periodical settlement during the performance of the work. This Article contains this provision:

> * * * The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. * * *

Article XIV provides for settlement of disputes; this Article provides:

> * * * If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, of if the Contractor shall consider himself prejudiced by any decision of the Contracting Officer made under the provisions of Article IV hereof, the matter shall be referred to the Officer in charge of Cantonment Construction for determination. If, however, the Contractor shall feel aggrieved by the decision of the Officer in charge of Cantonment Construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

As to this provision of the contract in so far as it undertakes to bind the Government by a decision of an executive officer of the Government upon the proper construction of the provision of the contract, it is clearly void and not binding upon the Government. The courts can not thus be ousted of their jurisdiction and functions to construe contracts. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Guaranty Trust & Safe Deposit Co.* v. *Green Cove Springs & M. R. Co.*, 139 U. S. 137; and cases cited on pages 20, 21, 22, 23, 24, and 25 in the petition of the appellant for rehearing.

In interpreting this provision as to the finality of these monthly settlements and payments it is necessary in the law and under the express provisions of this contract to interpret all provisions of the contract which may relate in any way to or have any bearing upon its proper interpretation. Article I of the contract contains this provision:

> The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the Contracting Officer, all machinery, equipment, hand tools, supplies, and materials, for which the Contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. *These provisions as to title shall not operate to relieve the Contractor from any duties imposed hereby or by the Contracting Officer.* (The italics are ours.)

It is here provided as to title passing to the United States of all machinery, equipment, hand tools, supplies and materials for which the contractor shall be entitled to be reimbursed; that the title shall pass only after inspection and approval in writing by the contracting officer. This inspection and approval of the contracting officer and the passing of title to the United States is, however, not to operate to relieve the contractor from any of its contractual obligations. If the contracting officer should approve in writing machinery, equipment, hand tools, supplies and materials which were unnecessary for the

performance of the work because of his want of knowledge as to such necessity, or for any other reason, this would not be binding upon the Government. But, of course, such inspection and approval of these articles in the progress of the work would inevitably be followed by payment therefor at the monthly settlements, the contracting officer having inspected such articles and given his approval hereof in writing. If, therefore, these monthly settlements and payments are to be final and conclusively binding upon the Government, this reservation in Article I is nullified.

It is a well settled principle of construction of contracts that where separate provisions of the contract appear to conflict and one to nullify and render inoperative the other, that a construction will be sought which will not have this effect. Can the provisions as to the final effect of the settlement contained in Article IV be reasonably so construed as not to conflict with the provisions contained in Article I; if it can, it is the duty of the court in construing it to give it such construction as will give effect to the provision of Article I; thus giving effect to both provisions.

These monthly settlements and payments were to be made as the work progressed. The magnitude of the contracts was such that it was plainly necessary for the contractor in order to carry on the work to obtain these monthly payments from the Government. It would manifestly be impossible owing to the great

magnitude of the work and the multiplicity of operations being carried on for the contracting officer to be fully informed as to all the facts necessary to a final settlement. In order, however, that the work should not be stopped some one must be clothed with authority to tentatively determine what was due to the contractor at each of these monthly settlements and payments. Continual disputes must be avoided if the work was to be carried out and completed in the shortest possible time, but it was not the intention of the contracting parties that these monthly settlements should be final and binding before any and all tribunals if it should later be discovered that overpayments were made to the contractor by reason of his failure to comply with his contractual obligations. In the progress of the work, however, they were to be final and binding as to matter of accounting between the parties for such partial, tentative settlements, and in order that the work might proceed in the most expeditious manner.

It is also provided in Article V that:

> * * * the Contractor shall preserve for a period of two years after its completion or cessation of work under this contract, all the books, records and other papers just mentioned.

This was manifestly necessary so that the Government might have such books and accounts available in case it should become necessary to make an investigation of the matter of compliance with the terms of the contract by the contractor, and to make

effective the provision of the contract that notwithstanding the contracting officer may have inspected and approved the purchase by the contractor of machinery, equipment, hand tools, supplies, materials, etc., that this inspection and approval should not relieve the contractor from full compliance with the obligations imposed upon him by the contract.

The passing of title to the Government of the completed structures, including in their cost both materials and labor, also were not to relieve the contractor according to the provisions of Article I from any obligation imposed upon it by the contract.

It therefore appears that the question always remains open whether the contractor did or did not comply with all the duties and obligations imposed upon him by the contract,—ever keeping in mind that the contractor sustained a position of trust and confidence toward the Government.

Article II of the contract contains this provision:

> The Contractor shall be reimbursed in the mannner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items.

That is, the approval of the contracting officer is not sufficient under the terms of the contract to bind the Government, but it is made equally essential to the reimbursement of the contractor for any expenditure that it shall fall under one of the several items specifically recited in the contract.

It is also to be noted that there is no provision for a release of actions and claims upon the termination of the contract by performance.

The only settlement provided between the parties is the monthly statement made by the contractor and the payment on presentation of vouchers and invoices, but there is no final settlement with mutual releases of any and all actions and claims.

There have been filed by the Government and are now pending in various jurisdictions actions growing out of contracts like the one in question. This is particularly true of the actions which are brought with reference to the building of cantonments for all of these cantonment contracts are practically the same as the contract in these cases. In these cantonment actions the Government is seeking to recover damages for waste and extravagance of a character that amounts to a fraud against the Government. Up to the present time actions have been filed and are now pending in the District of Massachusetts; the Eastern District of New York; the District of New Jersey; Eastern District of West Virginia; Eastern District of South Carolina; Southern District of Ohio; Eastern District of Michigan; Eastern District of Arkansas; Southern District of Iowa; District of Kansas; Western District of Texas. The amount of recovery sought in these several cases ranges from three million to seven million dollars each. The defendants are pleading and relying upon the *finality* of the settlements as interpreted by the opinion hereinbefore announced in these cases, and citing such

opinion as decisive authority for their contention. And so it becomes important and of vital interest to the Government that the court carefully consider the terms of this contract with respect to the court's reference to the finality of the settlement evidenced by the action of the contracting officer in making the monthly settlements provided for in Article IV of the contract.

There are many other actions instituted by the United States seeking to recover for overpayments made under these war contracts, and the provisions of these contracts for monthly payments are in their essential features similar to the provisions of Article IV of the contract here in question.

It does not seem reasonable in the circumstances under which these contracts were made that the provision stipulating for monthly payment should estop the Government from thereafter questioning their correctness. The Government's necessities and situation at the time these contracts were executed and during their performance were trans-normal because of the presence of actual war. The Government needed war necessities and instrumentalities, and it required them "in the shortest possible time." The contractor had to have early payments, and frequently advance payments were made that he could perform the service or produce the articles required. These circumstances should be taken into consideration in construing the terms of the contract. The monthly payments in the circumstances were not made as in the ordinary course of business in times of peace—this is obvious.

The question which the Government makes is: that the premium paid upon this bond is not a part of the actual net expenditures in the performance of the work for which the Government undertook to reimburse the contractor.

The court decided that it was not necessary to determine that question for the reason that the contract provided that the decision of the contracting officer should govern in case of a dispute, and that this decision was absolutely and finally binding upon both parties whenever the question should be brought under consideration in a court.

It is the Government's contention that it was beyond the power and authority of an executive officer of the Government to bind the Government by a misconstruction of the terms of the contract so that the question could not be raised and decided by the courts. If the court should reach the conclusion that the contention of the Government in this respect is correct, then, of course, the court will be under the necessity of interpreting the contract and determining whether this is an item of cost for which, having been incurred by the contractor, the Government is required to reimburse him.

Article II provides that "the contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the *performance of said work* as may be approved or ratified by the contracting officer and as are included in the following items;" (the italics are ours). Paragraph (h) is one of those items, and provides for reimbursement for:

> Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require;

This Article requires the Government to reimburse the contractor only for expenditures incurred in the *performance of the work*. The bond to obtain which this premium was paid was not a bond required by the contracting officer in the performance of the work, but was required by the statute, and this must be given preliminary to any performance of the work under the contract.

Article IX also provides:

> The Contractor shall prior to commencing the said work furnish a bond. * * *

It was, therefore, not an expenditure in the performance of the work as required by the contract, and it is our contention that if it was not an expenditure incurred in the performance of the work, it is immaterial to the court what construction may have been put upon this provision of the contract, the language being clear, by executive officers of the Government.

Article XIV provides:

> * * * If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, * * * the matter shall be referred to the Officer in charge of Cantonment Construction for determination. * * *

It is to be noted that the interpretation is to be an interpretation of "*anything in this contract.*"

The contracting officer or the officer in charge of cantonment construction, or the Secretary of War, are limited under the provisions of Article XIV to the interpretation of the meaning of the terms of the contract; they are not authorized to insert new terms. In authorizing the payment of any expense incurred by the contractor they must put their finger upon some section of the contract that in "meaning" permits it. If the payment of the premium is a liability of the United States it is only so because subdivision (h) of Article II when read in connection with the first paragraph that the expenditure must have been made in the performance of the work makes the Government liable therefor.

If any of these officers have put a wrongful interpretation upon that provision of the contract in holding that it renders the Government liable when such provision does not, the Government is not bound by any such interpretation because it is founded upon a misconstruction of law, to wit,—a wrong construction of the provisions of the contract.—*Wisconsin Central R. Co.* v. *United States*, 164 U. S. 190, 210; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291.

It is respectfully submitted that the judgments of the Court of Claims, in so far as they relate to the premiums upon the bonds in question, should be reversed.

JAMES M. BECK,
Solicitor General.
RALPH E. MOODY,
Special Assistant to the Attorney General.

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